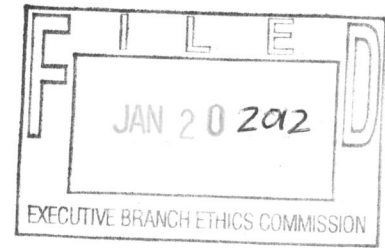


**COMMONWEALTH OF KENTUCKY  
EXECUTIVE BRANCH ETHICS COMMISSION  
AGENCY NO. 08-017  
ADMINISTRATIVE ACTION NO. 08-EBEC-0338**



EXECUTIVE BRANCH ETHICS COMMISSION

COMPLAINANT

vs.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
RECOMMENDED ORDER AND NOTICE OF APPEAL RIGHTS**

FELICIA M. WOOTEN

RESPONDENT

\* \* \* \* \*

An Administrative Hearing was held in this matter on November 1, 2011. The Complainant Kentucky Executive Branch Ethics Commission was represented by Kathryn H. Gabhart, General Counsel, with John Steffen, Executive Director, as Co-Counsel. The Respondent, Felicia M. Wooten, was represented by Luke Morgan, McBrayer McGinnis Leslie & Kirkland and Bobby H. Richardson, Richardson Gardner Barrickman & Alexander. The Hearing was presided over by Susan S. Durant, Hearing Officer, Administrative Hearings, Office of the Attorney General. The following witnesses testified: JoJuana Leavel-Greene, Human Resources Branch Manager for PVA Administrative Support, Department of Revenue; Dennis Miller, Branch Manager for the Southern Region of Kentucky, Revenue Cabinet; in addition to Ms. Wooten.

The issue in this matter is whether Felicia Wooten as PVA of Harlan County violated KRS 11A.020(1)(c) by using her official position or office to obtain financial gain for her son Derrick Wooten when she requested his promotion on December 11, 2006, from Field Representative Senior to Field Representative Principal in the Harlan County PVA Office. It is concluded that Felicia Wooten did violate the cited statute although Derrick was already an employee in the office when she was elected PVA and his vacancy promotion appears to have

been fair and impartial in the context of a chain of office promotions.

### **BRIEF PROCEDURAL BACKGROUND**

1. On October 7, 2008, an Initiating Order was filed in this matter by the Executive Branch Ethics Commission. The Initiating Order in regard to Felicia Wooten was one of eleven initiating orders charging various Property Valuation Administrators (PVAs) throughout the Commonwealth with violating KRS 11A.020(1)(c). The charged statute states:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

All of the PVAs were charged with violating the Executive Branch Code of Ethics because they employed and/or promoted members of their families.

2. On October 30, 2008, Wooten, along with the other PVAs, filed an Answer to the Initiating Order. On December 2, 2008, the PVAs, who were all represented by the same two attorneys, filed an Agreed Order Holding Administrative Actions in Abeyance.

3. The administrative actions were stayed while the PVAs prosecuted a declaratory judgment action in Franklin Circuit Court. In that action the PVAs asserted that they were not "public servants" or "officers" as defined in KRS 11A and thus were not subject to the jurisdiction of the Executive Branch Ethics Commission. The Franklin Circuit Court judge agreed that the Executive Branch Code of Ethics did not apply to PVAs. The Executive Branch Ethics Commission appealed the Franklin Circuit Court judgment to the Kentucky Court of Appeals. On June 18, 2010, the Court of Appeals in an unanimous decision reversed the Franklin Circuit Court judgment. *See, Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W. 3d 472 (Ky. App. 2011). On June 9, 2011, the Kentucky Supreme Court denied discretionary review.

4. On June 13, 2011, Franklin Circuit Court issued an Order of Dismissal that lifted the abeyance of this administrative action. On July 26, 2011, the parties agreed to hearing dates for the first five PVAs' actions to be heard.

### **FINDINGS OF FACT**

5. On April 1, 1991 Felicia M. Wooten began her employment in the Harlan County Property Valuation Administrator's Office. Ms. Wooten was initially employed during an emergency take-over of various PVA offices by the state because of a deficiency in property valuation. At the time Jerry Blanton was the Harlan County PVA. *See* Exhibit 2 to the Hearing of November 1, 2011. (Hereinafter cited as Ex. \_\_.)

6. On July 16, 2001, Derrick Wooten, Felicia Wooten's son was hired by Jerry Blanton. Derrick was hired as a Field Representative I and his initial pay grade was 5. Ex. 7.

7. By the fall of 2006, Felicia was serving as the Chief Deputy in the office. She was a Grade 13. Immediately under Felicia in regard to grade was Linda Wilson who was a Grade 9. Also in the office under Blanton were Derrick Wooten who was a Grade 8 field representative and Kathy Sundy who was a Grade 8 clerk. Dewana Moore was a Grade 7 clerk. Ex. 2.

8. On December 4, 2006, after Blanton's retirement Felicia Wooten was elected Harlan County PVA. Within the first year of her election, Felicia undertook significant payroll actions that affected all of the personnel in the office. Thus by the time the PVA Budget Projected for 2007-2008 for Harlan County, Ex. 3, was issued by the Department of Revenue, everyone in the office had received a pay and grade increase over the previous year's projected budget. Linda Wilson received Felicia's previous position and became the Chief Deputy moving from Grade 9 to Grade 13. Derrick Wooten went from Grade 8 to Grade 9. In the Request for Personnel Action (RPA) that Felicia signed on December 11, 2006, she remarked "with Linda

moving to Chief Deputy Derrick will have added responsibilities both in the office & in the field sales, files, mapping etc.” Ex. 1. With the December 11 vacancy promotion Derrick received a pay increase. Ex. 1. Kathy Sundy was promoted from a Grade 8 to a Grade 9. During the same period Dewana Moore’s grade increased from Grade 7 to Grade 9. Crystal Vanover was hired effective January 1, 2007, as a Grade 8 field representative. Ex. 2, Ex.3.

9. The 2007-2008 projected budget indicates that Moore’s grade increase was at least in part the result of a Reclassification. It is probable that Moore received a promotion as well as a reclassification. Derrick Wooten also received a Reclassification during the same time period. The April 4, 2007, reclass requested by Wooten, which took effect on June 1, 2007, was the result of Derrick’s having taken two courses. In addition to a salary increase, Derrick went from a Grade 9 to a Grade 10. Ex. 6. Reclassifications are essentially merit based, non-discretionary, and automatic. A reclass requires 30 hours of course work with a gap of twenty-four months since the last reclass. The Executive Branch Ethics Commission conceded that Derrick’s reclassification was not a violation of the Ethics Code. Transcript of the Hearing at 32. (Hereinafter cited as Tr. at 32.)

10. JoJuana Leavel-Greene, who is the Human Resources Branch Manager for PVA Administrative Support in the Department of Revenue, explained the function of the RPA. She testified that the purpose of the RPA is so that an employee can be paid through the state government’s payroll system. The PVA interviews and selects employees who are to be hired or promoted. Only the PVA can sign off on the “recommended” line on the RPA. Leavel-Green then signs as “approved” indicating that the office has a vacancy at the position and grade requested and that the individual has the required experience or education. PVA employees are not required to be evaluated. Only the PVA can fire an employee. All employees serve at the

pleasure of the PVA.

11. Leavel-Greene also testified that in November, 2006, she attended training for new PVAs. Felicia Wooten was present at the same training. One of the speakers was Jill LeMaster, who was the Executive Director of the Executive Branch Ethics Commission at the time. LeMaster spoke about the Executive Branch Code of Ethics including the prohibition against a PVA hiring a family member. LeMaster referenced Executive Branch Ethics Commission Advisory Opinion 04-34 in which the Commission emphasized that KRS 11A.020 prevented PVAs from in any way advocating or influencing a favorable employment action in regard to a family member. Tr. at 74. Leavel-Greene testified that November, 2006, was the first time that she as an HR Support person for PVAs was aware that there was a nepotism prohibition for PVAs. She also knew that various PVAs employed family members in their offices, *see also* Tr. at 200, but family relationship was not one of the categories that she was obligated to double-check for payroll input. She was aware that as an employee of the Finance and Administration Cabinet, she could not hire a family member.

12. As a result of the November, 2006, training according to Leavel-Greene, she and others in the Finance Cabinet drafted a form headed "New Hires Property Valuation Administrator Certification Applicant Information." Tr. at 76. By signing the form the PVA was to certify that he or she had read Advisory Opinion 04-34 and that the applicant was not a family member under the definition in KRS 11A.010(4). The form was introduced around January 31, 2007. Ex. 4. The form would be kept in the applicant's personnel file.

13. Leavel-Greene further testified that the New Hires form that specifically referenced Advisory Opinion 04-34 was short-lived. After a few weeks the New Hires form was pulled from the Finance and Administration Cabinet's Website and was replaced by a form that

had previously been posted. Tr. at 78. That form simply required the employee, not the PVA, certify that the employee knew that he or she would be subject to the Executive Branch Ethics Commission's *Guide to the Executive Branch Code of Ethics*. Ex. 5.

14. Felicia Wooten testified that when she heard LeMaster in November, 2006, she understood that the message was that the Ethics Commission recommended that PVAs not hire family members. She did not comprehend that the prohibition encompassed promotions as well as hiring. Tr. at 146.

### CONCLUSIONS OF LAW

15. KRS 11A.020 provides:

(1) No public servant, by himself or through others, shall knowingly:

....

(c) Use his official position or office to obtain financial gain for himself or any member of the public servant's family.. . .

The provision, as part of the Executive Branch Code of Ethics, became effective on July 14, 1992, and has not been amended subsequently.

16. In the first year of its existence, the Executive Branch Ethics Commission, under the authority of KRS 11A.110(1) issued Advisory Opinion 92-10 which concluded that PVAs were covered by the Executive Branch Code of Ethics. Advisory Opinion 93-24 then followed in response to a query as to whether the Executive Branch Code of Ethics "disallowed" PVAs to employ relatives. Advisory Opinion 93-24 stated "the Executive Branch Code of Ethics does not specifically prohibit the employment of relatives in PVA offices. However...." [Emphasis added.] The Commission then cited KRS 11A.020(1)(a) and (c) and concluded: "The Commission envisions certain circumstances where conflicts of interest could arise under such employment. The Commission encourages your agency to follow policies to avoid any real or perceived conflict of interest in this area." Ex. 9. In short, the Commission did not state that the Code

prohibited nepotism, but it also warned that employing family members could easily create a conflict of interest. Advisory Opinion 93-24 seemed to issue a “word to the wise,” the Commission knowing that many PVAs traditionally had family members in their offices.

17. In its post-hearing closing the Ethics Commission argued that a focus of 93-24 was to reassure state employees who were covered by the new statute that family members who were already in the employ of the state government would not be fired as the result of the ethics provisions—but family favoritism would not be permitted.

18. Six years later the issue of a PVA and nepotism arose again with the Commission. In a letter dated September 13, 1999, Jill LeMaster, the Executive Director of the Executive Branch Ethics Commission, informed a PVA that the Commission would not act against that PVA’s employing his spouse in his office pending the passage of proposed nepotism legislation. This private letter by the Executive Director to a specific PVA remained a small blip in the Commission’s dealing with nepotism because the legislature did not pass the proposed section. No credible evidence was introduced at the Hearing as to why the proposal died. Ex. 10.

19. On September 30, 2004, the Commission on its own motion again took up the issue of family members being employed in the same state agency as a public servant. The occasion was recent investigations within the Department of Parks which revealed that Parks and other state agencies needed further guidance. Advisory Opinion 04-34 again recited KRS 11A.020(1) and then proceeded to more explicitly set out real and perceived problem areas:

[T]he Commission believes that KRS 11A.020(1)(a), (c) and (d) serve to prohibit a public servant from advocating or influencing in any way the employment, appointment, promotion, transfer, advancement of a member of the public servant’s family to an executive branch position of employment that the public servant directly supervises or manages.

Specifically, employees should not be involved in interviewing, recommending, or approving family members for positions within their employing agencies . . . .

The Advisory Opinion commended the Parks Department for the fact that it was drafting and implementing policies and procedures that would address nepotism. Ex. 11. Again, the Commission was issuing “a word to the wise”—this time the word was that agencies should put their own houses in order to forestall outside enforcement.

20. On July 29, 2007, the Ethics Commission issued Advisory Opinion 07-19 which reviewed nepotism under the Executive Branch Code of Ethics and amended Advisory Opinion 04-34. The Opinion stated that Advisory Opinion 04-34 pointed out that KRS 11A.020(1)(a), (c), and (d) prohibited advocating or influencing employment actions in regard to family members. Included in the Opinion was the definition of “Family” in KRS 11A.010(4). The Opinion then took up the persistent problem of how to deal with family members who were already under the supervision of a family member and have been for many years. The Commission concluded that “the need to be fair to such **employees who were in employment situations prior to the issuance of Advisory Opinion 04-34** serves to allow such employees to remain in their positions under the supervision of a family member provided the family member takes action to remove as much potential for conflict as possible.” But the Opinion reiterated that since Advisory Opinion 04-34, public servants should not have been involved in the employment, supervision, or promotion of family members.” Ex. 12.

21. The antepenultimate paragraph of Advisory Opinion 07-19 is especially relevant to the situation regarding Felicia and Derrick Wooten:

[P]ublic servants who are elected to their positions, such as constitutional officers and property valuation administrators, may find themselves elected to supervisory situations that pose a conflict for them if a family member prior to the election already was employed in the office that serves the position to which they were elected. In these circumstances, the previously employed family members may retain their position, but again, a public servant who continues to directly supervise a family member should ascertain that any action he takes regarding the



family member be fair and impartial. Any use by a public servant of his position to give a family member an unfair advantage may be a violation of the executive branch code of ethics.

22. Thus the advisory opinions have not been uniformly hard-nosed about conflicts of interest in the form of nepotism in regard to public servants but they have consistently said that public servants' employing, promoting, and supervising their family members created conflicts of interest. The Advisory Opinions started out gently in their warnings in 93-24; became quite firm in 04-34; and then relented a bit in 07-19. Presumably, if public agencies and public servants read and abided by the Executive Branch Code of Ethics, most problems would disappear over time as alert public servants no longer helped family members by placing them in positions where there could be potential conflicts of interest.

23. In a large state agency public servants could perhaps have family members who were hired, evaluated, and supervised by others, but PVAs hire and fire all employees in their office and there are no evaluations. In an office such as that in Harlan County with 5½ budgeted deputies, or employees, all employees would be under the direct control of the PVA despite any attempted layers of intermediate supervision.

24. In her closing at the Hearing, Wooten argued that the Executive Branch Ethics Advisory Opinions were contradictory in their content and illegal in their form. Wooten stated that the Commission was trying to elevate the advisory opinions to the status of regulations or law. She interpreted 93-24 to mean that family members were permitted to be hired and thus 04-34 was an about-face. The Hearing Officer concludes that the focus of the nepotism opinions shifted slightly but there was no significant contradiction. And, KRS 11A.110 (1) clearly gives the Commission the authority to "issue and publish advisory opinions on the requirements of this chapter for those who wish to use the opinions to guide their own conduct."

25. Instead of using the Ethics advisory opinions for guidance, Wooten suggests using OAG Opinion 88-15 which found “no specific authorizing regulation for the Personnel Commissioner and the Personnel Board to promulgate regulations concerning nepotism.” The Hearing Officer does not find it persuasive to argue that because the Personnel Board or the Personnel Commission cannot promulgate regulations against nepotism, the Legislature could not give the statutory authority to deter nepotism in the executive branch to another administrative body.

26. Also, Wooten offered Governor Steven Beshear’s Executive Order of June 2, 2008, as guidance. That Executive Order stated that it is state policy to provide equal employment opportunity to all people without discrimination because of race, color...ancestry....” The Hearing Officer concludes that this broad affirmative policy set out in an Executive Order opens the doors of opportunity to all within the state. Nepotism lets only family members enter the door of opportunity. The prohibition of nepotism is concerned with public trust, impartiality, and the integrity of public servants.

27. It is to be stressed, furthermore, that this case was brought under KRS 11A.020 (1)(c)—no Advisory Opinion was cited in the Initiating Order. The Advisory Opinions are useful in providing guidance, but the foundation of the complaint against Wooten is the statute. Although the evidence presented at the Hearing is that Wooten was informed, after her election and before she assumed office, about the content of Advisory Opinion 04-34, she is not legally presumed to be familiar with past ethics opinions. Wooten is presumed to be familiar, however, with the law of the state:

It is well established that all persons are charged with knowledge of the laws pertaining to their conduct. *Flint v. Executive Branch Ethics Commission*, 981 S.W.2d 132, 134 (Ky. App., 1998).

28. Wooten argues that the statute is ambiguous or vague. The statute states: “No public servant, by himself or through others, shall knowingly ...use his official position or office to obtain financial gain for himself or any member of the public servant’s family.. . .” *Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W. 3d 472 (Ky. App. 2011), has already determined that Wooten, and all PVAs are “public servants.” There has been substantial evidence that Wooten knowingly promoted her son, Derrick, on December 11, 2006, effective December 18, 2006. Ex. 1, and that Felicia was the only person in the office with the authority to recommend the promotion. Thus, “financial gain” appears to be the vague or ambiguous element in the statute.

29. KRS 11A.010(3) defines “compensation” as “any money, thing of value, or economic benefit conferred on, or received by any person in return for services rendered, or to be rendered, by himself or another.” KRS 11A.010(6) defines “income” as “any money or thing of value received or to be received as a claim on future services, whether in the form of a fee, salary, expense allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital gain, or any other form of compensation or any combination thereof.” “Financial gain” would appear to include “compensation” and “income” and could, in some circumstances, be broader and not associated with past or future services. In the context of this matter “financial gain” appears to include such as salary, health insurance, paid sick and vacation leave, contributions to retirement. The rule of lenity which Wooten suggests be applied, appears to be irrelevant because there is no ambiguity and this is not a criminal matter.

30. The fact that Derrick Wooten’s December, 2006, promotion resulted in a pay increase of “only” \$90 a month does not mean that he received such a small financial gain that the ethical concerns are obliterated. The amount of financial gain is relevant to the penalty but

does not affect the violation. *See*, KRS 11A.080(4)(a). And, it is to be observed that the 5% increase that Derrick received for his December promotion was magnified by his subsequent 5% increase for the reclassification in April.

31. The difficulty in this case is not the statute. It is clear that Felicia Wooten violated KRS 11A.020(1)(c) when she promoted her son Derrick Wooten in December, 2006. The quandary is the interaction between the statute and the advisory opinions. Although Advisory Opinion 07-19 was issued after Derrick's promotion it appears relevant because it amends Advisory Opinion 04-34. Advisory Opinion 07-19 talks about the necessity of being fair to those who were in employment situations prior to Advisory Opinion 04-34. It urges a layer of supervision between the public servant and the family member. The public servant must treat the family member in a fair and impartial manner and not give the family member an unfair advantage. Opinion 07-19 essentially provides a "safe haven" for those who were public employees prior to 04-34 as long as the public servant does not give them an unfair advantage. In Harlan County Felicia Wooten put a layer of supervision between herself and Derrick which had not been there previously. She did not give Derrick an unfair advantage. All of the deputies in the office received promotions--the rising tide of Felicia's election pushed all boats toward the shore with Linda Wilson getting the most benefit. As 07-19 indicated, Derrick should not be penalized because his mother was successfully elected. To have promoted everyone but Derrick would seem unjust because Felicia was not responsible for his initial appearance in the office.

32. In *Hagan v. Farris*, 807 S.W.2d 488 (Ky., 1991), the Supreme Court dealt with a situation in which the Alcoholic Beverage Control Board permitted the owner of a retail package liquor license to renew a dormant liquor license for two years despite a regulation against such a lengthy buy-out period. The decision stated: "In most cases, an agency's interpretation of its own

regulations is entitled to substantial deference.....It is usually the practice to conform to an agency's construction when that agency was responsible for a regulation's adoption." Despite the fact that the ABC Board had misinterpreted its own regulation, however, the Court felt it would be unfair and unjust to overrule the Board's decision and say that the liquor license owner had no license to transfer. The Court finally concluded that the "parties have acted in reliance on the law as it existed, and a contrary result would be unconscionable." *Id.* at 490. In this matter Wooten appears to have acted on advisory opinions as they existed, but her promotion of Derrick was a violation of the unvarnished statement of KRS 11A.020(1)(c). An advisory opinion may not contradict a statute.

33. The Hearing Officer has no equitable powers. She can only determine what the statute requires. The statute does not say "unfair financial gain" or "financial gain through a situation which was not originally the result of Wooten's hiring practice." It prohibits "financial gain for any member of the public servant's family."

### **RECOMMENDED ORDER**

On the basis of the above Findings of Fact and Conclusions of Law, it is recommended that Felicia Wooten be ordered to cease and desist any further violation of KRS 11A.020(1)(c) in hiring or promotions actions. No fine or other penalty is appropriate under the circumstances.

### **NOTICE OF EXCEPTION AND APPEAL RIGHTS**

Pursuant to KRS 13B.110 (4) you have the right to file exceptions to this recommended decision:

(4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.

In order to preserve a right to review by the circuit court, case law requires that a litigant must file exceptions with the board or agency if there is anything in the recommended order with

which a party does not agree and desires to appeal.

You have a right to appeal the Final Order of the agency pursuant to KRS 13B.140 which reads in part:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." The Court of Appeals has suggested that an appeal to circuit court is commenced upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

SO RECOMMENDED this *19th* day of January, 2012.



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## CERTIFICATE OF SERVICE

I hereby certify that the original of this RECOMMENDED ORDER was mailed this 19th day of January, 2012, by messenger mail, to:

DEBBIE BRISCOE  
EXECUTIVE ASSISTANT  
EXECUTIVE BRANCH ETHICS COMM  
#3 FOUNTAIN PLACE  
FRANKFORT KY 40601

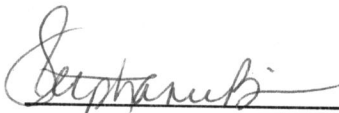
for filing; and a true copy was sent by first-class mail, postage prepaid, to:

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